(21)

No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF OF AMICI CURIAE ARIZONA MAIL ORDER COMPANY, INC., BASS PRO SHOPS, INC., BLOOMINGDALE'S BY MAIL LTD., THE BRADFORD EXCHANGE, LTD., CABELA'S, INC., CURRENT, INC., DOUBLEDAY BOOK & MUSIC CLUBS, INC., FINGERHUT COMPANIES, INC., HANOVER DIRECT INC., HARRY AND DAVID, LILLIAN VERNON CORPORATION, MBI, INC., NEW HAMPTON, INC., THE NEIMAN MARCUS GROUP, INC., PUBLISHERS CLEARING HOUSE, RODALE PRESS, INC., SFA FOLIO COLLECTIONS, INC., AND USAA BUYING SERVICES, INC. IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST [1]

Amici are large mail order companies that conduct their business in interstate commerce.[2] Despite differ-

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[1] Counsel for all parties have consented to the filing of this amicus brief. *Amici* have filed those consents with the Clerk of this Court.

[2] Appendix A briefly describes the interest of each individual *amicus*.

ences in product line and customer base, these *amici* share certain characteristics: they each solicit orders from customers throughout the United States by mail, receive orders, generally fill them from a central fulfillment center, and ship those orders by mail or common carrier. In states where they have a physical presence and hence nexus with the taxing state, these *amici* have recognized their obligation to collect use tax from their mail order customers and remit that tax to state authorities. However, in those states where they have not had physical presence, they have generally not collected use tax, relying on this Court's long-standing decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

These *amici* could face staggering potential retroactive tax liability if this Court were to overturn *Bellas Hess* and allow states to force mail order companies to remit use tax for past periods based on nexus less substantial than physical presence. The burden of this retroactive tax liability would fall directly on these companies, since once a mail order transaction has been completed, it is virtually impossible for the company to collect the use tax from the customer.

Amici estimate that their potential retroactive tax liability is in the millions of dollars for each company and that the potential retroactive tax liability of mail order companies throughout the United States is in the billions of dollars. These *amici* believe that the imposition of such retroactive tax liability would be both unfair and inconsistent with principles of orderly judicial decision-making. While they urge that *Bellas Hess* was correctly decided and should be reaffirmed on that ground, they also urge that, even if this Court would reach a different result as an original matter today, principles of *stare decisis* should in and of themselves lead this Court to adhere to *Bellas Hess*.

INTRODUCTION AND SUMMARY

This Court has repeatedly recognized that a state cannot impose tax obligations on an out-of-state business unless the business has a "substantial nexus" with the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). For nearly a quarter of a century, this Court's leading decision defining the required nexus in the context of interstate mail order sales has been *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). There, this Court ruled that states cannot impose use tax collection and payment obligations on out-of-state mail order companies having no physical presence within the state.

The Court noted that the requirement that a company be physically present (*i.e.*, have "retail outlets, solicitors, or property" within the taxing state) before being subject to use tax obligations was a "basic distinction" which had been "generally recognized by the state taxing authorities." *Bellas Hess*, 386 U.S. at 758. The Court applied this bright line rule to mail order companies, declining to adopt an alternative which would have based states' ability to impose use tax collection obligations on an uncertain assessment of whether a mail order company "regularly and continuously engage[s] in 'exploitation of the consumer market'" in the state. *Id.* at 762 (Fortas, J., dissenting). The Court found that, without this bright line distinction, mail order companies would be subject to "a virtual welter of complicated obligations to local jurisdictions," which would impose "unjustifiable local entanglements" on interstate commerce. *Id.* at 759-60. The Court left it to Congress to fashion legislation which would address the "unjustifiable local entanglements" that inconsistent state use tax laws would have imposed on interstate commerce, noting, "Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *Id.* at 760.

Amici urge that *Bellas Hess* was sound when decided and that its analysis of use tax collection and payment

burdens continues to be accurate today. The burdens on interstate companies of inconsistent regulation have actually increased, rather than decreased, with time, and technological advances in the mail order industry have not alleviated these burdens. Nor has the industry changed in any constitutionally significant manner since this Court's *Bellas Hess* decision. *Bellas Hess* continues to be especially important because it protects interstate commerce from the discrimination which would inevitably flow from imposing significantly greater collection costs on interstate companies than on their intrastate competitors. However, since petitioners and other parties will address those issues, this brief will focus on why principles of *stare decisis* require that the Court adhere to *Bellas Hess* whether or not as an original matter it would decide *Bellas Hess* today the same way that it did in 1967.

A party seeking to have this Court overrule one of its decisions must provide "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).[3] In determining whether to adhere to past decisions, this Court has examined a variety of considerations, including whether the earlier decision was based on incomplete analysis;[4] whether the law, factual context, or policies underlying the decision have changed since the precedent was de-

[3] "[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), *quoting* The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton); *see also Payne v. Tennessee*, 111 S.Ct. 2597, 2609 (1991); *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987) ("the doctrine of *stare decisis* is of fundamental importance to the rule of law").

[4] *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 (1984).

cided;[5] whether the precedent provides a workable standard;[6] and whether overruling the precedent would frustrate legitimate reliance interests.[7] These considerations support continued adherence to *Bellas Hess*. The *Bellas Hess* case was thoroughly briefed, based on contemporaneous Congressional hearings which had fully addressed the use tax collection issue.[8] Neither the law nor the factual context has changed since *Bellas Hess*: this Court has continued to demand that states demonstrate a substantial nexus between themselves and the business they seek to tax. *See infra* pp. 7-9. Furthermore, it is indisputable that the "bright line" rule of physical presence articulated in *Bellas Hess* provides a far more workable standard for judging states' ability to impose use tax collection obligations than any other alternative measure of nexus.[9]

This brief, however, focuses on the fourth *stare decisis* factor: reliance interests. As this Court noted last Term, "considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ." *Payne v. Tennessee*,

[5] *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 659-62 (1987); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

[6] *See, e.g., Swift & Co. v. Wickham*, 382 U.S. 111, 124-25 (1965).

[7] *See, e.g., Monell v. Dep't of Social Services*, 436 U.S. 658, 700 (1978).

[8] *See Bellas Hess*, 386 U.S. at 758-59 n.11 (citing H.R. Rep. No. 565, *Report of the Subcomm. on State Taxation of Interstate Commerce*, 89th Cong., 1st Sess. (1965)); *see also id.* at 760 n.15 (referencing H.R. Rep. No. 2013, 89th Cong., 2d Sess. (1966)).

[9] The protean test applied by the court below, copied substantially from the subjective "economic presence" test rejected in *Bellas Hess* (*see Bellas Hess*, 386 U.S. at 762; *Quill*, Pet. App. A5-A9), is of little use in adjudication and essentially *no* use to businesses seeking to plan their affairs with certainty. The North Dakota court as much as admitted this, noting its test was a "more case-specific" approach. *Quill*, Pet. App. A7.

111 S.Ct. at 2610.[10] For nearly a quarter of a century, *amici* and others have reasonably relied on *Bellas Hess*: they have collected use tax when they have been physically present in a state, and generally have not collected it when they are not. Nothing has indicated that mail order companies should question their reliance on the physical presence test as articulated in *Bellas Hess*. For the past 24 years, this Court has acknowledged and applied *Bellas Hess* as controlling law. The state supreme courts, with the exception of the decision below, have uniformly recognized its continuing validity, and Congress has refused to legislatively "overrule" the precedent.

If *Bellas Hess* were now overruled, mail order companies could face potential retroactive tax liabilities totalling billions of dollars. *See infra* pp. 11-20. None of this retroactive liability could be recovered from the customers originally liable for the tax. The Court should not sanction such fundamental unfairness, especially when Congress has the authority and ability to fashion forward-looking legislation that would enable the states to utilize out-of-state companies to collect use tax, reduce the burdens now associated with such collection efforts by a uniform national approach, and avoid the imposition of unfair, retroactive tax liability.

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[10] The core of *stare decisis* is that the principle furthers "the stability and predictability required for the ordering of human affairs over the course of time." *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). *Stare decisis* ensures that "the law will not merely change erratically," and "permits society to presume that bedrock principles are founded in the law rather than in the proclivity of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). It "embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

ARGUMENT

THIS COURT SHOULD REAFFIRM ITS DECISION IN *NATIONAL BELLAS HESS, INC. v. DEPARTMENT OF REVENUE*, 386 U.S. 753 (1967)

I. MAIL ORDER COMPANIES HAVE JUSTIFIABLY RELIED ON *BELLAS HESS* FOR NEARLY TWENTY-FIVE YEARS

This Court's 1967 decision in *Bellas Hess* did not break new ground; to the contrary, *Bellas Hess* was clearly foreshadowed by the Court's prior decisions in the use tax area. In each of the use tax decisions leading up to *Bellas Hess*, this Court based its finding of nexus upon physical presence.[11] Thus, when *Bellas Hess* announced that a mail order company with no physical presence in the State could not be forced to collect use taxes, the case was no anomaly.

However, the North Dakota Supreme Court here concluded that since 1967 "the foundational basis of *Bellas Hess* has been eroded . . ." because a "striking shift" in this Court's jurisprudence occurred in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *See Quill*, Pet. App. A13. But *Complete Auto*, in announcing a new four-part test for invalidating state tax laws under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3), did not question *Bellas Hess*. It continued to require a "substantial nexus" between the state and the company the state wants to tax. *Complete Auto*, 430 U.S. at 279.

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[11] *See Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939) (presence of the company's agents and subagents in the state); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941) (maintenance of local retail stores, local advertising, and performance of business related to mail order sales); *General Trading Co. v. Tax Comm'n*, 322 U.S. 335 (1944) (retailer sent a sales force into the jurisdiction); *Miller Bros. v. Maryland*, 347 U.S. 340 (1954) (where there was regular and continuous solicitation, but no local stores or local agents, the State has *not* established use tax nexus and may not force collection of the tax); *Scripto v. Carson*, 362 U.S. 207 (1960) (presence of ten of the company's wholesalers in the state).

And since *Complete Auto*, this Court has repeatedly reaffirmed its adherence to *Bellas Hess*.

For example, in *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), decided less than a month after *Complete Auto*, the Court applied the "bright line" substantial nexus rule of *Bellas Hess* and rejected a claim that a company's "slightest presence" in the state was sufficient. *Id.* at 556. In doing so the Court reaffirmed *Bellas Hess*' "careful[] underscor[ing of] . . . the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like the company in *Bellas Hess*] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.'" *Id.* at 559 (quoting from *Bellas Hess*, 386 U.S. at 758). Four years later, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the Court clarified that *Bellas Hess* is the touchstone of the first prong of the *Complete Auto* test,[12] and in each of the last three years this Court has referred to *Bellas Hess* with approval.[13] Before this Court's grant of certiorari in this

[12] "Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. *See National Bellas Hess, Inc. v. Illinois Revenue Dep't*, 386 U.S. 753 (1967)." *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original).

[13] *See D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988) ("In *National Bellas Hess*, we held that the State of Illinois could not, consistently with the Commerce Clause, compel an out-of-state mail order company to collect a use tax on purchases of goods by Illinois residents when the seller's only connection with its Illinois customers was by mail or common carrier"); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) (Court noted that *Bellas Hess* is benchmark of substantial nexus: "We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. *See National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) (receipt of mail provides insufficient nexus)"); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 110 S.Ct. 688, 699-700 (1990) (*Bellas Hess* and *National Geographic* control issue of substantial nexus).

case, it had previously declined two invitations to revisit its *Bellas Hess* precedent within the last year.[14] And, before this case, no opinion of any Justice had expressed disagreement with *Bellas Hess*.

With the exception of the decision below, state appellate and supreme courts have reinforced mail order companies' reasonable reliance on *Bellas Hess* by repeatedly recognizing the precedent's control of the use tax nexus issue.[15]

[14] *See SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied sub nom. Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, 111 S.Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990).

[15] *See, e.g., SFA Folio Collections, supra* n. 14; *Cally Curtis, supra* n. 14; *Bloomingdale's By Mail, Ltd. v. Dep't of Revenue*, 591 A.2d 1047 (Pa. 1991), *aff'g* 567 A.2d 773 (Pa. Commw. Ct. 1989), *cert. filed*, No. 91-383 (Sept. 3, 1991); *Pearle Health Services, Inc. v. Taylor*, 799 S.W.2d 655, 658 (Tenn. 1990); *Alaska Airlines, Inc. v. Dep't of Revenue*, 769 P.2d 193, 198 (Or. 1989), *cert. denied*, 110 S.Ct. 717 (1990); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo. App. 1988); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review*, 382 N.W.2d 145, 150 (Iowa), *cert. denied*, 479 U.S. 817 (1986); *Avco Financial Serv. Consumer Discount Co. One, Inc. v. Director Div. of Taxation*, 494 A.2d 788, 795 (N.J. 1985); *Illinois Commercial Men's Ass'n v. State Bd. of Equalization*, 671 P.2d 349, 355 (Cal. 1983), *app. dism'd*, 466 U.S. 933 (1984); *Boswell v. Paramount Television Sales, Inc.*, 282 So. 2d 892, 897 (Ala. 1973); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971). Apart from the decision below, the only other decisions questioning *Bellas Hess* have been two lower court decisions in Tennessee, neither of which is final. *See SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson Cty. Chancery Ct. Tenn. March 11, 1991) and *Bloomingdale's By Mail Ltd. v. Huddleston*, No. 89-3017-II (Davidson Cty. Chancery Ct. Tenn. March 8, 1991). The ruling in the *By Mail* case is on appeal to the Tennessee Supreme Court, and that court is holding the case pending the outcome of this case. *See Bloomingdale's By Mail Ltd. v. Huddleston*, No. 01-S-01-9106-CH-00047, Order of October 28, 1991 (per curiam). The *Folio* case has been placed on inactive status pending the *By Mail* appeal. As noted above, in 1990 the Tennessee Supreme Court in *Pearle* recognized the continued vitality of *Bellas Hess*.

Two of these decisions have been rendered in the last eight months,[16] and just four months ago, a federal district court enjoined California's attempt to impose use tax collection obligations on direct marketing companies with no physical presence in that State.[17]

Even the North Dakota Supreme Court's decision in this case refusing to follow *Bellas Hess* could not be said to provide notice of any impending change in the governing constitutional law. Under the Supremacy Clause, this Court's decisions bind the lower courts, as well as state executive officers and legislators.[18] Similarly, the fact that some states have changed their use tax statutes to base nexus on mere catalog solicitation does not suggest that mail order companies should no longer follow *Bellas Hess*. Enforcing such statutes while *Bellas Hess* still controls the issue of use tax nexus is simply unconstitutional.

Continued reliance on *Bellas Hess* has also been justified by Congress's consistent refusal to overrule that precedent. For many years states have lobbied for legislative overruling, and in recent years numerous bills have been introduced to achieve legislatively the goal that North Dakota seeks before this Court.[19] But Congress has not

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[16] *See supra* n. 15.

[17] *Direct Marketing v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991 (1991 U.S. Dist. LEXIS 10736) (notice of appeal filed 9th Cir. July 16, 1991).

[18] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see also, e.g., Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 221 (1931).

[19] *See, e.g.*, S. 2368, 100th Cong., 2d Sess. (1988); H.R. 3521, 100th Cong., 1st Sess. (1987); H.R. 1891, 100th Cong., 1st Sess. (1987). Hearings have been conducted on a number of legislative proposals. *See, e.g., State Taxation of Interstate Commerce: Hearing on S. 1510 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987); *Collection of State Sales and Use Taxes by Out-of-State Vendors:*

taken any action, conveying to all parties—state taxing authorities and mail order companies alike—the continuing vitality of *Bellas Hess*.

Thus, mail order companies have reasonably concluded that *Bellas Hess* continues to govern the issue of use tax nexus.

II. BECAUSE MAIL ORDER COMPANIES HAVE ORDERED THEIR AFFAIRS IN RELIANCE ON *BELLAS HESS*, OVERRULING THAT DECISION COULD IMPOSE POTENTIALLY MASSIVE RETROACTIVE LIABILITY ON THOSE COMPANIES

If *Bellas Hess* were overruled, mail order companies would be threatened with liability for uncollected taxes (plus accrued interest and sizeable penalties) in the thirty-eight states that currently define nexus by referring to catalog distribution or other forms of advertising. Of those thirty-eight states, twenty have had such "catalog nexus" provisions in effect in some form for decades, many dating back to the 1940's and 1950's. *See* Appendix B. In 1966, for example, New Jersey amended its definition of a "vendor" subject to use tax collection obligations to include any "person who solicits business . . . by distribution of catalogs and other advertising matter . . . ."[20] Such statutes were in effect when this Court decided *Bellas Hess* in 1967 and appear to include all mail order sales within their scope, inasmuch as they are specifically drafted to make catalog solicitations a sufficient nexus.

Hearing on S. 639 and S. 1099 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance, 100th Cong., 1st Sess. (1987).

[20] N.J. Stat. § 54:32B-2(i)(2)(c) (1966).

Nevertheless, even before *Bellas Hess*, most states refused to enforce existing catalog nexus provisions against out-of-state sellers engaged solely in disseminating catalogs and shipping goods into the state by mail or common carrier.[21] This position stemmed from prevailing "uncertainty as to the constitutional limits of the State's authority," [22] an uncertainty well founded on this Court's jurisprudence. *See supra* p. 7.

Bellas Hess resolved any uncertainty and rendered the existing catalog nexus statutes unenforceable against interstate mail order sellers. Between 1967 and 1986, state taxing authorities generally abided by *Bellas Hess* and did not attempt to impose use tax collection and payment obligations on mail order sellers with no physical presence in the state, even though such sellers fell within many statutory definitions of nexus.[23]

Although there has been no change in this Court's jurisprudence, this policy of nonenforcement began to erode in 1986, when some states abandoned their longstanding practice of administrative forbearance and aggressively sought to enforce their catalog nexus statutes against

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[21] Brief for Appellant at 13, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241) (stating that the states with catalog nexus provisions "have rarely attempted to enforce the obligation"); *see also Bellas Hess*, 386 U.S. at 758 n.11 (citing Congressional testimony).

The one state court that specifically considered the issue prior to *Bellas Hess* construed its statute to avoid invalidation on Federal constitutional grounds, and found that Alabama's statute did not apply to purely interstate mail order sellers. *Alabama v. Lane Bryant, Inc.*, 171 So. 2d 91 (Ala. 1965).

[22] H.R. Rep. 565, *Report of the Subcomm. on State Taxation of Interstate Commerce*, 89th Cong., 1st Sess. at 627, 633 (1965).

[23] In one instance where tax authorities attempted to seek such obligations, they were rebuffed. *See Book-of-the-Month Club, supra* n. 15.

traditional mail order sellers.[24] For example, in Pennsylvania, the Department of Revenue attempted to enforce the State's old catalog nexus statute against an out-of-state mail order seller. The Pennsylvania statute, effective since 1959, imposed use tax obligations on sellers "maintaining a place of business" in the Commonwealth, defined to include those sellers which are "[r]egularly or substantially soliciting orders within [Pennsylvania] by means of catalogues or other advertising . . . ." Section 201(b)(3) of the Tax Reform Code of 1971, Pa. Stat. Ann. tit. 72 § 7201(b)(3) (Purdon 1990). The Department argued that "a mail-order seller . . . falls within the ambit of Section 201(b)(3)." *See L.L. Bean, Inc. v. Commonwealth Dept. of Revenue*, 516 A.2d 820 (Pa. Commw. Ct. 1986). Similarly, after 20 years of complying with *Bellas Hess*, Tennessee recently adopted a new tax policy that challenges prevailing constitutional limitations,[25] relying on its new interpretation of pre-existing Tennessee law,[26] which required a company to collect use taxes if it "[d]istributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents of [the] State." [27]

If this Court were to alter its prior constitutional interpretation, any state with a catalog nexus provision

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[24] *See* Douglas, *State Officials Determined to Tax Interstate Mail Order Sales*, 47 Tax Notes 1048 (1990) (citing fiscal constraints and frustration with the decision of Congress not to overrule *Bellas Hess* as major factors in states' new attempts to impose use tax obligations).

[25] *See* Letter from Jim McLeod, Chief of Field Audit, Sales and Use Tax Division, Tennessee Dep't of Revenue, to Bloomingdale's By Mail (Aug. 10, 1989). Representative letters have been lodged with the Clerk of the Court for the convenience of the Court.

[26] Tenn. Code Ann. § 67-6-102(4)(J) (1983) (later renumbered -102(6)(J)).

[27] For a portion of the assessment period the State also relied on a recent amendment to the Tennessee use tax provisions which further expanded their scope. *See* letter *supra* n.25.

could change its entrenched policy of nonenforcement and adopt this new construction. The overwhelming number of states have never judicially construed their catalog nexus provisions in this context. In all but one of the states where the judiciary has addressed the question, the only barrier to the reinterpretation of most existing laws to cover mail order sales is this Court's decision in *Bellas Hess*; thus, nineteen states would be free to interpret their longstanding statutes so as to reach mail order sellers.[28]

The jeopardy to mail order sellers arises not only from the reinterpretation of existing law. In recent years many states have supplemented existing catalog nexus statutes with new statutes that directly contradict *Bellas Hess*. "Since 1987, a movement has quietly developed among the states to challenge industry interpretations of the scope and applicability of *Bellas Hess* through the passage of state legislation." [29] At least thirty-five states

[28] *See Bloomingdale's By Mail Ltd. v. Dep't of Revenue, supra* n. 15; *SFA Folio Collections, supra* n. 14; *Book-of-the-Month Club, supra* n.15; *but see Lane Bryant, supra* n.21 (Alabama's catalog nexus provision already construed not to apply to interstate mail order sellers).

The determination of states to extend their jurisdiction to the maximum possible constitutional limits is often expressed in the legislation itself. *See, e.g.*, N.Y. Tax Law § 1101(b)(8) (McKinney 1991) ("regular or systematic" solicitation by mail creates liability if such solicitation "satisfies the nexus requirement of the United States Constitution"); W. Va. Code § 11-15A-6a (Supp. 1990) ("substantial and recurring" solicitation by mail creates liability if seller has physical presence or "any other presence that provides the necessary minimum contacts for a constitutionally sufficient nexus"); *see also* Ga. Code Ann. § 48-8-1 (Michie 1982) (it is the intention of Georgia to "exercise its full and complete power to tax" retail sales and uses of tangible personal property "except to the extent prohibited by the constitutions of the United States and of [Georgia]").

[29] A. Morse & C. Zimmerman, *Efforts to Collect Sales Tax on Interstate Mail Order Sales: Recent State Legislation* 1 (National Conference of State Legislatures: June 1990).

(17 of which already had catalog nexus statutes), including North Dakota, have passed laws which purport to create use tax obligations for interstate sellers that are not physically present in the state, but which solicit sales by mailing catalogs to residents there. *See* Appendix C. Although specific state formulations vary, every state which has passed an "anti-*Bellas Hess*" statute in essence adopts the "economic nexus" test expressed by Justice Fortas in his *Bellas Hess* dissent.[30] Some impose use tax collection duties on sellers who engage in "regular or systematic" solicitation by mail, catalog or other interstate means, while others refer to "substantial and recurring" solicitation or "purposeful or systematic exploitation" of the marketplace. *See* Appendix C. In whatever language used, each of these new statutes ignores *Bellas Hess* by directly defying its prohibition against traditional mail order taxation. For example, in broadening Connecticut's statute to include "engaging in regular or systematic sales of tangible personal property in this State . . . by the distribution of catalogs," [31] legislators observed that the amendment "flies in the face of a Supreme Court case" and "would not comply with the requirements in . . . *Bellas Hess*." [32]

Some of the states with newly enacted legislation have aggressively sought to enforce their purportedly expanded taxing powers by targeting mail order companies, re-

[30] *See* White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor: One Constitutional Step Beyond Scripto and National Bellas Hess*, 42 Fla. L. Rev. 775, 778 (1990).

[31] Conn. Gen. Stats. Ann. § 12-407(12), (15) (West Supp. 1991).

[32] *See* Connecticut House of Representatives, Hearings on SB702 at 2647, 2618 (April 5, 1989); *see also* Nebraska Attorney General Opinion No. 87020 (Feb. 17, 1987) ("[W]e believe certain aspects of the [Nebraska anti-*Bellas Hess*] amendment pose serious constitutional difficulties under the standards enunciated by the Supreme Court").

questing that they register and begin collecting tax, and issuing assessments against those who rely on *Bellas Hess* and refuse to comply.[33] In California alone, state taxing officials issued assessments against more than 200 mail order companies in the months following passage of California's statute. DM News, August 1, 1989, at 1. Representatives from the Florida Department of Revenue in enforcement letters to out-of-state mail order sellers have stated that *Bellas Hess* "is contrary to the current official position of this Department . . . ."[34] These enforcement efforts have prompted litigation to challenge the new statutes in at least five states in addition to North Dakota.[35]

It is equally clear that states such as North Dakota intend to assess taxes retroactively.[36] In only a few states

[33] *See* State Enforcement Letters (lodged with the Court); Tennessee Tax Quarterly, Department of Revenue, Vol. 8, No. 3, July-Sept. 1988), *reprinted in* Tenn. Tax Rep. (CCH) ¶ 400-162 at 22,276 (1988) ("Tennessee plans a very aggressive program to ensure compliance. An effort to notify probable dealers of their responsibility is a part of the program . . . . Dealers who fail to comply voluntarily may be audited and held liable for any uncollected taxes plus applicable penalties and interest dating to the law's enactment date").

[34] Letter from J. William Norman, Technical Assistant, Florida Department of Revenue, to Laura A. Kulwicki (Feb. 7, 1990); *see also* Letter from Joanne Limbach, Ohio Tax Commissioner, to Daniel T. White (Apr. 24, 1990), quoted in White, *Emerging State Use Tax Collection Legislation, supra* n.30 at 791 n.111.

[35] *See Bennett, supra* n.17; *SFA Folio Collections, Inc. v. Tracy*, No. 91-295 (Ohio Bd. of Tax Appeals, appeal filed March 8, 1991), appeal from *SFA Folio Collections*, No. 910002000 (Ohio Tax Comm'r, Feb. 8, 1991); *Renovator's Supply, Inc. v. Sharp*, No. 91-9493 (Tex. Dist. Ct., filed July 5, 1991); *see also supra* n.15 (Tennessee litigation). State attempts to impose obligations contrary to *Bellas Hess* continue even in states such as Connecticut, where the state supreme court has continued to follow *Bellas Hess*. *See, e.g., The Neiman Marcus Group, Inc. v. Meehan*, No. 387601 (Conn. Super. Ct., appeal filed Dec. 10, 1990).

[36] *See supra* n.35 (proceedings pending in Tennessee, Pennsylvania, California, Ohio, Texas, and Connecticut). Idaho's notification letter to mail order sellers informs them that if "court decisions support Idaho's law, businesses that have not collected and remitted sales/use tax may be faced with a retroactive tax liability." Letter from Jim Jennison, Idaho Tax Discovery Officer, to SFA Folio Collections, Inc. (May 8, 1990). South Carolina similarly asserts that "[a]ny nonresident retailer . . . who has the requisite 'nexus' with South Carolina, may be held accountable for all use tax due and owed the State, for all periods open under the statute." S.C. Information Letter #89-15 (June 13, 1989). Florida officials assert that "future decisions affirming state power in this area could result in substantial liability for taxes that should have been collected over a number of years in the past." Letter from J. William Norman, Technical Assistant, Florida Dept. of Revenue, to Laura A. Kulwicki (Jan. 31, 1990).

have the statutes been written to protect against retroactive liability; thus, reinterpretation and enforcement of old catalog nexus statutes, coupled with enforcement of new anti-*Bellas Hess* legislation, would likely create enormous retroactive tax consequences for mail order sellers if *Bellas Hess* were overruled.[37] This is so because most

[37] So far as we are aware, no state has expressly disclaimed retroactive liability, but in a few states the statute bars enforcement until a change in this Court's jurisprudence or the passage of federal legislation. *See, e.g.*, Colo. Rev. Stat. § 39-26-301 *et seq.* (Supp. 1991) (creating use tax liabilities for out-of-state sellers, but only after "passage of federal legislation authorizing states to require out-of-state retailers to collect sales or use taxes"); La. Stat. Ann. § 47-305E (West Supp. 1990) (liability arises for sales promoted through catalogs "and for which federal legislation or federal jurisprudence enables taxation"); Massachusetts Department of Revenue Technical Information Release No. 1988-13 (December 8, 1988) (the "clear legislative intent" behind enactment of the statute "was that the expanded Massachusetts jurisdiction would not be exercised until federal statutory or case law specifically authorizes each state to require foreign mail order vendors to collect sales and use taxes on goods delivered to that state"). It is unclear whether the Louisiana and Massachusetts statutes would be interpreted as barring retroactive liability once *Bellas Hess* were overruled. In Colorado the new statute was conditioned on the passage of federal legislation, but an earlier unqualified statute remains on the books. Colo. Rev. Stat. § 39-26-102(3)(6) (Supp. 1991). In view of this lack of clarity, we have excluded these three states in computing retroactive liability in Appendices E & F.

states possess virtually unlimited authority in assessing back taxes.[38] As a result, mail order sellers could face exposure for uncollected taxes on sales dating back to the effective date of each state's catalog nexus statute, which in some instances is theoretically more than forty years [39] and includes virtually all past sales made by many mail order companies.

The resulting economic burden can be quantified by referring to estimates of "lost" tax revenues attributable to mail order sales protected by *Bellas Hess*. Recent estimates of revenue loss range from $694 million to $3 billion per year.[40]

The economic consequences of states' express attempts to enforce old catalog nexus statutes in a manner directly inconsistent with *Bellas Hess* would threaten the economic health—if not the very existence—of many mail order companies. Even limiting liability to uncollected taxes on sales made since 1985 (*see infra* n. 42), and using the revenue estimates provided by the Advisory

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[38] Of the 44 states and the District of Columbia that currently impose sales and use taxes, 35 states do not impose any period of limitations on assessments when no return is filed. The remaining ten jurisdictions permit the taxing authorities to assess taxes for past periods ranging from three to eight years. *See* Appendix D.

[39] *See* Appendix B.

[40] *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. at 95 (1988) (testimony of Direct Marketing Association) (citing 1986 study by Robert R. Nathan Associates, Inc., *An Economic Study of the Likely Impact of Overturning the Bellas Hess Decision on State Tax Revenues* (1986) (estimating a $694 million annual loss)); *Cf.* Greenhouse, *Court to Review Mail-Order Tax Curb*, N.Y. Times, Oct. 8, 1991 at D1, col. 3 (states estimate a $3 billion annual revenue loss).

Commission on Intergovernmental Relations,[41] mail order sellers could be held accountable for as much as $9.5 billion in past taxes. *See* Appendix E.[42] This figure does not even account for additional liabilities imposed by interest and penalty assessments authorized by every taxing statute. Penalties for failure to collect and remit taxes average twenty-five percent of the unpaid tax, and interest rates range from eight to 28 percent. 1A All St. Sales Tax Rep. (CCH) ¶ 8-350 at 9733-9735 (1991); *see, e.g.*, Fla. Stat. Ann. § 212.12(2)(a) (West 1989) (penalty of 5 percent per month up to a maximum of 25 percent); Idaho Code § 63-3046(o) (Michie 1989) (penalty of 5 percent per month up to a maximum of 25 percent); N.J. Stat. Ann. § 54:49-4 (West 1991) (penalty of $100.00 per month plus 5 percent per month up to a maximum of 25 percent). If the calculations are limited to liabilities under recently enacted statutes, mail order sellers face approximately $5 billion in liability for uncollected taxes. *See* Appendix F.

The billions of dollars at stake would come directly from mail order sellers. While the tax itself is owed by the consumer, not by the mail order seller, states have claimed the power to directly assess sellers who fail to

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[41] *See* Advisory Commission on Intergovernmental Relations, *Estimates of Revenue Potential from State Taxation of Mail Order Sales* 9 (1987) ("ACIR Study") (estimating mail order tax revenue in 1988 at approximately $2.4 billion). The ACIR Study figures are disputed by many parties, but even using the most conservative estimate ($694 million annually), the potential retroactive tax liability for past years is huge.

[42] Although the states could conceivably attempt to reach back to impose back tax liability on sales made since the effective date of the catalog nexus provisions (as early as the 1940's in some states), such efforts would be severely impaired by practical constraints resulting from the lack of available records. In estimating the potential exposure faced by mail order sellers, a seven-year period was selected to provide a conservative estimate of the realistic exposure. *See* Appendix E.

collect the required use tax.[43] As a practical matter none of this retroactive tax liability can be recovered from the consumer that owed the tax. The resulting hardship would occur not as a consequence of a calculated business gamble in refusing to collect tax, but in express reliance on direct Supreme Court precedent that unambiguously defined the scope of the seller's obligation.

III. SINCE JUSTIFIED, SETTLED EXPECTATIONS ARE AT STAKE, THE COURT SHOULD ADHERE TO *BELLAS HESS*

Under these circumstances, this Court should reaffirm *Bellas Hess* and the principle that mail order companies cannot be subject to use tax obligations unless they are physically present in the taxing state. To be sure, *Bellas Hess* is a constitutional case, and the Court has noted that *stare decisis* has "more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct [the Court's] mistakes through legislation . . . ." *Monell v. Dep't of Social Services*, 436 U.S. 658, 695 (1978). Yet in constitutional cases as well, "[t]here is a strong public interest in stability, and in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication."[44] Thus, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).[45]

Among the "weighty considerations" which "underlie the principle that courts should not lightly overrule past decisions," first is the desirability of enabling individuals "to plan their affairs with assurance against untoward

[43] *See* 1 All St. Sales Tax Rep. (CCH) ¶ 2-025 at 2012 (1991); *Prentice-Hall's Guide to Sales and Use Taxes* 28, 29 (1985).

[44] *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 780-81 (1986) (Stevens, J., concurring).

[45] *See also City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-20 (1983).

surprise . . . ." *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). "When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

Since *amici* and others have operated their businesses under *Bellas Hess* for nearly a quarter of a century, there are "strong reliance interests that would be threatened"[46] —and indeed frustrated—if this Court overruled *Bellas Hess*. Since 1967, "the reliance interest sought to be protected by the doctrine of *stare decisis* has grown up around the settled rule."[47] A number of considerations strongly suggest that reliance interests are even more weighty in this case than in most constitutional cases:

First, while reliance interests always require this Court to reassess precedents with caution, reliance is especially important for business decision-making. As noted above, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ." *Payne*, 111 S.Ct. at 2610. Businesses carefully tailor their operations to this Court's decisions.[48] Where businesses have justifiably relied on precedent, overruling severely disrupts business planning and operation.

Thus, the Court has strongly preferred stability in cases impacting business planning. In *National Bank v. Whitney*, 103 U.S. 99 (1880), for example, the Court considered whether it should overrule *National Bank v.*

[46] *Arkansas Electric Cooperative Co. v. Arkansas Public Utility Commission*, 461 U.S. 375, 392 (1983).

[47] *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 300 (1987) (O'Connor and Powell, JJ., and Rehnquist, CJ., dissenting).

[48] *See, e.g.*, W. Knepper, *Liability of Corporate Officers and Directors* § 14.02 at 418 (3d ed. 1978); J. Ayre, *Corporate Legal Departments: Strategies for the 1980s* 93 (1984).

Matthews, 98 U.S. 621 (1878), which had interpreted an Act of Congress to allow a national bank to enforce a mortgage of lands against the mortgagor and parties claiming under him. The Court noted that "[i]t is not unreasonable to suppose that [national banks] have conducted their business and made loans to a large amount in reliance upon [*Matthews*], and that in many cases great injury would follow a departure from it." *Whitney*, 103 U.S. at 102. Under these circumstances the Court declined to overrule *Matthews*.

> Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed.[49]

Second, adherence to *Bellas Hess* is particularly appropriate because it would affect the tax consequences of past conduct. The Court has been especially hesitant to impose massive retroactive tax liabilities, recognizing that tax planning is one of the foundations of business operations.

For example, in *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943), the Court refused to find that Congress had intended a statutory change in the tax law seven years previously to overturn, *sub silentio*, *Eisner v. Macomber*, 252 U.S. 189 (1920), which had held that stock dividends were not taxable. In language strikingly applicable to this Court's reconsideration of *Bellas Hess*, the *Griffiths* Court noted that: "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability." *Griffiths*, 318 U.S. at 402. The Court explained that such a change in tax administration would

[49] *Whitney*, 103 U.S. at 102.

be extremely detrimental: "To rip out of the past seven years of tax administration a principle of law on which both Government and taxpayers have acted would produce readjustments and litigation so extensive we would contemplate them with anxiety." *Id.* at 403.

Third, this case involves the interpretation of the Commerce Clause—a constitutional provision that was itself designed to promote stability in commerce. So far as we have been able to determine, in the Commerce Clause context this Court has never overruled a precedent where it has been shown that this would have imposed substantial retroactive liability resulting from justified reliance on an overruled decision. As we demonstrate in greater detail in Appendix G, in many overruling cases the Court dealt with newly enacted statutes which presented no significant problem of retroactivity. In others the Court either overruled prospectively or indicater that protection from retroactive liability remained an open question.

Fourth, Congress' power to legislatively modify or overrule *Bellas Hess* suggests that *Bellas Hess* merits even greater deference than would be accorded to most constitutional decisions of this Court. Here, the Court is not addressing a fundamental right that even Congress cannot reach with legislation;[50] rather, the Court is reassessing a Commerce Clause precedent, which Congress can modify using its *active* Commerce Clause power.[51]

[50] *Cf. Thornburgh*, 476 U.S. at 787 (White, J., and Rehnquist, CJ., dissenting); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) ("in cases involving the Federal Constitution, *where correction through legislative action is practically impossible*, this Court has often overruled its earlier decisions") (emphasis added).

[51] *See* Const. art. I, § 8, cl. 3; *see also, e.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). National Bellas Hess also challenged the Illinois use tax statute on Due

In fact, in *Bellas Hess* this Court specifically recognized Congressional power to change the result, noting that "[u]nder the Constitution, this is a domain where Congress alone has the power of regulation and control." *Bellas Hess*, 386 U.S. at 760. But that is an invitation which Congress has long declined. *See supra* p. 10.

Bellas Hess is therefore entitled to extreme deference since, as in the case of statutory interpretation, "correction can be had by legislation."[52] Here, as in statutory cases, legislation can make a change "with infinitely less derangement of [reliance] interests than would follow a new ruling of the court, for statutory regulations would operate only in the future." *Whitney*, 103 U.S. at 102.[53]

Finally, this Court's recent decisions severely restricting the availability of prospective overruling suggest that

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Process grounds. *Bellas Hess*, 386 U.S. at 756. The Court noted that the Due Process and Commerce Clause claims "are closely related" (*id.*), and invited Congress to change the *Bellas Hess* result if it saw fit (*id.* at 760); thus, the Court apparently assumed that any Due Process problems with use tax nexus could be resolved by Congressional "regulation and control." *Id.; see also, e.g.*, Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 Vand. L. Rev. 961, 983-92 (1986) (Congress possesses power to legislate in areas protected by Due Process Clause); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1021-31 (1986) (same).

[52] *Burnet, supra* n.50; *see also, e.g., Monell v. Dep't of Social Services*, 436 U.S. 658, 695 (1978); *United States v. South Buffalo R. Co.* 333 U.S. 771, 774 (1948); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 60 (1977) (White, J., concurring).

[53] Compare *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980) (*stare decisis* is entitled to less deference in a full faith and credit case, where Congress does not act with unfettered authority) to *Houston & Texas Ry. v. United States*, 234 U.S. 342, 350 (1914) (noting "the complete and paramount charatcer of the power confided to Congress to regulate commerce among the several States").

the Court should adhere even more faithfully to principles of *stare decisis*. For more than twenty years, when faced with a perceived need to overrule precedent, this Court has dealt with especially troublesome reliance interests by limiting the retroactive effect of the overruling decision so as to avoid upsetting settled expectations. *See* p. 26 *infra*. Recently, however, this Court has questioned whether prospective overruling is ever permissible.[54] If prospective overruling is no longer available, *stare decisis* is even more fundamental to fairness for litigants: "Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself." *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2450 (1991) (Blackmun, Marshall, and Scalia, JJ., concurring in the judgment).[55]

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[54] *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. at 2446 (opinion of Souter and Stevens, JJ.) ("[a]ssuming that pure prospectivity [in civil cases] may be had at all . . . its scope must necessarily be limited to a small number of cases . . . ."); *cf. Griffith v. Kentucky*, 479 U.S. 314 (1987) (announcing a rule of absolute retroactivity in criminal cases).

[55] Some Justices have argued that prospective overruling respects *stare decisis* because it allows the Court to change its mind without disappointing settled expectations. "At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them . . . . By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law." *Beam*, 111 S. Ct. at 2452 (O'Connor and Kennedy, JJ., and Rehnquist, CJ., dissenting). Others have argued that prospective overruling is bad, because it gives the Court too much flexibility and thereby undermines *stare decisis*. "By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents." *Beam*, 111 S. Ct. at 2450 (Blackmun, Marshall, and Scalia, JJ., concurring in the judgment).

Thus, whenever this Court has reassessed one of its precedents, it has recognized that it must avoid disrupting settled expectations. This case involves a valid precedent on which nearly twenty-five years of business plans have been based. Under these circumstances, *stare decisis* supports reaffirmation of *Bellas Hess*.

IV. IF THIS COURT WERE TO OVERRULE *BELLAS HESS*, IT SHOULD LIMIT THAT DECISION TO SOLELY PROSPECTIVE EFFECT

The same concerns that drive *stare decisis* also strongly counsel that, if *Bellas Hess* is overruled, such a decision be only prospective in application if that approach remains available.[56] Under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court may limit the retroactive effect of a decision provided that the case meets three criteria: (1) the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) the Court has "weigh[ed] the merits and demerits . . . by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"; and (3) the Court

[56] *Amici* recognize that this Court may not sanction "modified, or selective prospectivity," in which "a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement." *Beam*, 111 S.Ct. at 2444 (opinion of Souter and Stevens, JJ.); *see id.* at 2448 (White, J., concurring in the judgment); *id.* at 2449 (opinion of Blackmun, Marshall and Scalia, JJ., concurring in the judgment); *see supra* p. 25. But we understand the Court not to have foreclosed its ability to apply an overruling decision with *complete* prospectivity, "under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision." *Id.* at 2443 (opinion of Souter and Stevens, JJ.); *see id.* at 2449 (White, J., concurring in the judgment), 2452-56 (opinion of O'Connor and Kennedy, JJ., and Rehnquist, CJ., dissenting).

has "weighed the inequity imposed by retroactive application" and found that the new ruling "could produce substantial inequitable results if applied retroactively . . . ." *Id.* at 106-07 (citations omitted).

Amici have already demonstrated that this case quintessentially satisfies the first and third prongs of *Chevron Oil*. As shown above, any decision overruling *Bellas Hess* would contradict nearly twenty-five years of this Court's decisions, and, if such a decision were applied retroactively, it would pose substantial and unjust hardship. This case also satisfies the second prong of *Chevron Oil*. The policies behind any overruling of *Bellas Hess* would not be furthered by applying the decision retroactively, for several reasons:

First, the principal purported interest of the states in advancing the new "economic nexus" test is to raise state revenues by forcing mail order companies to collect and remit use taxes from consumers, who are said to "escape" taxation.[57] *Amici* disagree with the premise,[58] but even if the interest were a legitimate basis for overruling *Bellas Hess*, the policy simply is not served by retroactive overruling. Retroactive overruling would create new and purely retroactive liabilities for mail order companies, as opposed to the consumers who are said to be "escaping" taxation. The end result would be to make mail order companies, rather than consumers, pay the tax.

Second, another argument advanced for overruling *Bellas Hess* is to make mail order use tax nexus comport with allegedly new factual and legal conditions in the mail order industry.[59] While, as noted above, *amici* disagree with this argument,[60] in any event that policy ap-

[57] *Quill*, Pet. App. A25.

[58] *See Brief of Petitioner*.

[59] *Quill*, Pet. App. A10-A11.

[60] *Supra* pp. 7-9.

pears fundamentally prospective in nature. The Court would be judicially noting that factual or legal changes in the industry have forced the introduction of a new standard of nexus. The policy behind such a holding would not be furthered by allowing states to reach back in time and collect monies that they were not owed under *Bellas Hess*.

Finally, some have argued that overruling *Bellas Hess* would eliminate a perceived disparity between interstate and intrastate retailers.[61] Again, *amici* disagree that any such disparity, if present, could justify the introduction of a new disparity favoring in-state retailers.[62] Nevertheless, if this interest were to underlie a decision to overrule *Bellas Hess*, it would hardly be served by shouldering mail order companies with a substantial retroactive tax liability not borne by local retailers. Yet that would be the inevitable result of any decision to overrule *Bellas Hess* with full retroactive effect. Thus, if the Court decided that it must overrule *Bellas Hess*, under *Chevron Oil* the Court should limit the retroactive effect of its decision to avoid the inequities that would otherwise result.

* * *

Amici have argued that *stare decisis* supports reaffirmation of *Bellas Hess*, and that alternatively, if the Court determined to overrule *Bellas Hess*, it should do so only prospectively. Neither argument, however, should obscure two central facts: *Bellas Hess* was correctly decided in 1967, and the precedent continues to protect mail order companies from unjustifiable and discriminatory burdens on interstate commerce that would inevitably result in its absence.

Congress remains the proper forum for addressing states' concerns about the ability to raise revenue and mail order companies' justified fears about collection

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[61] *Quill*, Pet. App. A24-A25.

[62] *Supra* p. 4 (noting discrimination which would flow from imposing use tax collection burdens on interstate sellers).

burdens. There, the question of how much entanglement of interstate commerce should be tolerated in light of state fiscal concerns can be addressed based on a complete factual record, and burdensome and discriminatory obligations could be avoided. If Congress were persuaded to act, it could do so prospectively, to avoid upsetting reliance interests, and could implement changes using a phase-in period that would not suddenly impose new collection burdens on mail order companies. Until and unless that occurs, *Bellas Hess* should not be disturbed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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APPENDICES

APPENDIX A

INTEREST OF *AMICI*

Arizona Mail Order Company, Inc. is a national mail order company located in Tucson, Arizona, selling women's fashion merchandise by mail from its facilities in Arizona. Arizona Mail Order Company is currently involved in use tax collection proceedings in California.

Bass Pro Shops, Inc. is a mail order company selling sporting goods. Bass Pro Shops faces numerous claims of retroactive tax liability, and is currently litigating use tax collection cases in Arkansas and California.

Bloomingdale's By Mail Ltd. is a New York corporation conducting a general merchandise mail order business from its fulfillment center in Cheshire, Connecticut. By Mail is currently involved in use tax litigation in Tennessee and Pennsylvania, and has received numerous requests from states to register and begin collecting use tax, despite a lack of physical presence.

The Bradford Exchange, Ltd., located in Niles, Illinois, sells collectors' plates by mail in all 50 states. Many of its customers purchase from single page advertisements in national magazines and pay by check. The Bradford Exchange is very concerned about the possibility of retroactive use tax liability, having received requests from many states that want the company to collect and remit use taxes.

Cabela's Inc., is a mail order sporting goods company located in Sidney, Nebraska. Cabela's sends its catalogs throughout the United States and many foreign countries, and receives and fills orders from around the world. Cabela's is currently involved in use tax administrative proceedings in California and Tennessee, and has received requests from numerous other states that the company register and collect use tax, despite a lack of physical presence in those states.

Current, Inc. is a Delaware direct marketing company that sells primarily paper goods and stationery from its facilities in Colorado Springs, Colorado. Current is involved in use tax litigation in Tennessee, and many states have informed Current that the states will seek to impose use tax collection obligations.

Doubleday Book & Music Clubs, Inc. is a national direct marketer of books and music operating in New York and Pennsylvania. Doubleday Book & Music Clubs has received a request from Ohio to register and collect use tax.

Fingerhut Companies, Inc. is the nation's fourth largest catalog marketing company, located in Minnesota. Fingerhut Companies sells name brand and private label merchandise primarily to a lower middle income market, with an active base of more than 13 million customers. The company employs approximately 7,000 people at locations in Minnesota and Wisconsin. Fingerhut Companies has received requests from many states to register and collect use tax, and one affiliate has been subject to administrative proceedings in California.

Hanover Direct Inc., located in Hanover, Pennsylvania, is one of the largest direct marketing firms in the United States. Hanover Direct offers four different lines of merchandise through its 22 mail order catalogs.

Harry and David is a mail order seller of premium gift food items, located in Medford, Oregon. Harry and David is involved in use tax litigation in Tennessee, and has been contacted by other states attempting to impose use tax collection obligations despite a lack of physical presence.

Lillian Vernon Corp. is a Delaware specialty mail order company offering gift, household, decorative and children's merchandise to customers throughout the United States from its location in Virginia. Lillian Vernon is involved in use tax proceedings in California and Tennessee.

MBI, Inc. is a Connecticut mail order company that markets collectibles from its facility in Norwalk, Connecticut. Many states have requested that MBI collect and remit use taxes, and the company is concerned about the possibility of retroactive tax liabilities, given states' apparent disregard of *Bellas Hess.*

The Neiman Marcus Group, Inc. is a Delaware corporation whose Neiman Marcus, Bergdorf Goodman, and Horchow Collections divisions participate in direct marketing throughout the United States. The Neiman Marcus Group, Inc. collects and remits use taxes where it is physically present, but has not done so where nexus has not been demonstrated. The Neiman Marcus Group, Inc. is currently involved in use tax litigation in Tennessee and Connecticut.

New Hampton, Inc. is a mail order seller of women's and children's clothing based in Hampton, Virginia. New Hampton has been contacted several times by most of the states that are actively attempting to challenge *Bellas Hess*, and has received retroactive assessments of approximately $3 million from two states.

Publishers Clearing House is a multi-magazine subscription agency located in New York that sells nationwide via direct mail for over 200 leading publishers located in the United States and Canada. Publishers Clearing House has received requests from numerous states to register and collect use tax.

Rodale Press, Inc. is a publisher of books and magazines. Rodale Press has been contacted by numerous states attempting to impose use tax collection obligations despite the prohibition of *Bellas Hess.*

SFA Folio Collections, Inc. is a nationwide mail order company located in Yonkers, New York, offering general merchandise. Folio is currently involved in use tax litigation in Tennessee, and has received numerous requests to register and begin collecting use tax in states in which it is not physically present.

USAA Buying Services, Inc. is a nationwide mail order company located in San Antonio, Texas. USAA Buying Services solicits sales throughout the United States by catalogs offering jewelry, electronics, and gift items. USAA Buying Services has received many requests from states that want the company to register and collect use tax, despite the prohibition of *Bellas Hess*.

APPENDIX B

STATE STATUTES THAT DEFINE NEXUS TO INCLUDE MERE CATALOG SOLICITATION (PRE-*BELLAS HESS*)**

State	Statute(s)	Description of Liability	Effective Date
Alabama	Ala. Code § 40-23-66 (originally tit. 51 § 790)	"distributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents, within the state of Alabama" (construed in 1965 to avoid Federal constitutional invalidation (*supra* p. 12 n.21))	1945
Arkansas	Ark. Stat. Ann. § 26-53-102(4) (originally § 84-3104(d))	"vendor" = "every person engaged in making sales of tangible personal property, by mail order, by advertising"	1961
Colorado	Colo. Rev. Stat. § 30-26-102(3)(b) (originally § 138-5-2(22)(c))	"Doing business in this state" = "soliciting . . . by distribution of catalogues or other advertising"	1967
Florida	Fla. Stat. Ann. § 212.06(2)(g)	"Dealer" = "every person who solicits business . . . by distribution of catalogues or other advertising matter"	1955

State	Statute(s)	Description of Liability	Effective Date
Georgia	Ga. Code Ann. § 48-8-2(3)(H) (earlier § 91A-4501(c)(8) and § 92-2150.4)	"Dealer" = "every person who . . . solicits business . . . by the distribution of catalogues or other advertising matter and by reason of the solicitation receives and accepts orders from consumers in this state"	1951
Illinois	Ill. Stat. Ann. ch. 120 § 439.2	"retailer maintaining a place of business in this state" = "engaging in soliciting orders within this state from users by means of catalogue or other advertising"	1961
Kansas	Kan. Stat. Ann. § 79-3702(h)(2)	"retailer doing business in the state" = "engaging in soliciting orders within this state from users by means of catalogues or other advertising"	1965
Michigan	Mich. Admin. Code r. 205.26	"out-of-state seller . . . actively soliciting sales of tangible personal property in Michigan"	1961

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Mississippi	Miss. Code Ann. § 27-67-3 (earlier § 10146-02(11))	"retailer maintaining a place of business in this state" = "soliciting orders, or advertising through any media within this state"	1955
Missouri	Mo. Stat. Ann. § 144.605(11)	"vendor" = "every person engaged in making sales of tangible personal property by mail order, by advertising"	1959
New Jersey	N.J. Stat. § 54:328-2(i)(1)(C)	"vendor" = "a person who solicits business . . . by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state"	1966
New Mexico	N.M. Stat. Ann. § 72-17-5	Subject to use tax if "retailer selling tangible personal property for . . . use . . . in this state" (no nexus definition)	1939
[same]	Ch. 47, § 10, Laws of 1966	"Every person carrying on or causing to be carried on any activity within this state attempting to exploit New Mexico's markets, who sells property . . . for use in this state" "Activity" = "delivering . . . products as a consequence of an advertising or other sales program directed at potential customers"	1966

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State	Statute(s)	Description of Liability	Effective Date
New York	N.Y. Tax Law § 1101(b)(8)	"vendor" = "a person who solicits business . . . by distribution of catalogues or other advertising matter"	1965
Ohio	Ohio Rev. Code Ann. § 5741.01(H)	"Engaged in the business of selling in this state" = "soliciting business by distribution of catalogs or other advertising matter, or by any means whatsoever, and by reason thereof, receiving orders for tangible personal property from consumers within this state"	1962
Pennsylvania	Pa. Stat. Ann. tit. 72 § 7201(b)(3)	"maintaining a place of business in this Commonwealth" = "regularly or substantially soliciting orders within this Commonwealth . . . by means of catalogues or other advertising"	1959
Rhode Island	R.I. Gen. Laws § 44-18-23(C)	"engaging in business" = "solicitation of orders and advertising in this state . . . by circulars, coupons, samples, and similar advertising material mailed to, or distributed within this state to residents of this state; and telephone solicitation of orders from residents of this state"	1958
[same]	[as amended]	"solicitation of orders and advertising in this state by means of . . . catalogs . . . mailed to or distributed within this state to residents of this state"	1966
South Carolina	S.C. Code Ann. § 12-35-840 (earlier § 65-1424)	"Every person or company who distributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents within the state"	1951
Tennessee	Tenn. Code Ann. § 67-6-102 (earlier § 1248.53)	"dealer" = "any person . . . who distributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents of this State"	1955
Vermont	Vt. Stat. Ann. tit. 32 § 9701(9)(C)	"vendor" = "a person who solicits business . . . by distribution of catalogues or other advertising matter"	1969

State	Statute(s)	Description of Liability	Effective Date
Virginia	Va. Code Ann. § 58-441.12(h)	"Dealer" = "every person who . . . solicits business in this state . . . by distribution of catalogues or other advertising matter"	1966

** When *Bellas Hess* was decided in 1967, both Idaho and Massachusetts had use tax statutes which contained catalog nexus provisions. Subsequent amendments expressly prohibited enforcement against a seller whose activities "consist solely of solicitation by direct mail or of advertising which does not involve the physical presence of agents or other representatives." Idaho Code § 63-6311(3) (1969); *see also* Mass. Gen. Laws ch. 64H § 1(5) (1971) ("engaged in business in the commonwealth" includes "regularly soliciting orders . . . unless such activity consists solely of solicitation by direct mail . . . .").

APPENDIX C

STATE STATUTES DRAFTED TO SPECIFICALLY CHALLENGE *BELLAS HESS*

State	Statute(s)	Description of Liability	Effective Date
Alabama	Ala. Code § 40-23-1(a)(5)	Deems common carrier or U.S. Postal Service to be seller's agent	4-30-86
	Ala. Code § 40-23-68, amended by Act 576 (H.B. 371) (Supp. 1990)	"substantial and recurring" solicitation + benefits from banking, financing, debt collection; catalog distribution	9-01-91
Arizona	Ariz. Rev. Stat. Ann. § 42-1401(5)(b) (Supp. 1989)	"substantial and recurring" solicitation + benefits from banking, financing, debt collection, etc.	9-15-89
Arkansas	Ark. Stat. Ann. § 26-53-121(b) (Supp. 1989)	"continuous, regular or systematic solicitation" by mail, catalog or media	7-01-87
California	Cal. Rev. & Tax. Code § 6203 (West 1975 & Supp. 1991)	"substantial and recurring" solicitation and benefits from banking, financing, debt collection, etc.; affiliate "in the same or a similar line of business" in the state	1-01-88

State	Statute(s)	Description of Liability	Effective Date
Colorado	Colo. Rev. Stat. § 39-26-301 *et seq.* (Supp. 1991)	out-of-state retailer subject to tax by federal legislation	Enacted 1990 (eff. upon passage of federal legis.)
Connecticut	Conn. Gen. Stat. Ann. § 12-407(12), (15) (West Supp. 1991)	"regular or systematic" solicitation by mail, catalog, media; affiliate in "same as or similar" line of business in the state	7-01-89
Florida	Fla. Stat. Ann. § 212.0596 (West Supp. 1991)	Taxes "mail order sales" if dealer "purposefully or systematically exploiting the market" by catalogs, advertising or media	10-01-87
Georgia	Ga. Code Ann. § 48-8-2(3)(H) (Supp. 1991)	"regular or systematic solicitation" by catalogs, advertising or media	7-01-90
Idaho	Idaho Code § 12-407(12), (15) (Supp. 1989)	"substantial and recurring" solicitation + benefits from banking, financing, debt collection, etc.; affiliate engaged in "same or similar line of business in the state"	7-01-89
Illinois	Ill. Ann. Stat. ch. 120 ¶ 439.2 (Smith-Hurd 1991)	"substantial and recurring" solicitation and benefits from banking, financing, debt collection, etc.; affiliate engaged in "same or similar line of business in this state"	1-01-90
Iowa	Iowa Code Ann. § 422.43(12) (West 1990)	"continuous, regular, seasonal or systematic" solicitation by mail and benefits from banking, financing, debt collection, etc.; affiliate engaged in "same or similar line of business in the state"	7-01-88
Kansas	Kan. Stat. Ann. § 79-3702(h) (Supp. 1990)	"regular or systematic" solicitation by mail, catalogs, advertising or media	7-01-90
Kentucky	Ky. Rev. Stat. Ann. § 139.340(2) (Michie 1991)	"continuous, regular or systematic" solicitation if solicitation, placement or payment of order utilizes "financial institution, telecommunication system, radio or television station, cable television service, print media, or other facility or service located in this state"	7-15-88
Louisiana	La. Rev. Stat. Ann. § 47:301(4)(l) (West Supp. 1991)	"regular or systematic" solicitation by mail, catalogs, advertising, media, etc.	7-01-90
[same]	§ 47:305E (West Supp. 1991)	sales promoted through catalogs "and for which federal legislation or federal jurisprudence enables" taxation	7-01-90

State	Statute(s)	Description of Liability	Effective Date
Massachusetts	Mass. Ann. Laws ch. 64H § 1(5) (Law. Co-op. Supp. 1991)	"regularly or systematically" soliciting sales or "exploiting the retail sales market" by mail, advertising, media, etc.	1-01-89
Minnesota	Minn. Stat. Ann. § 297A.21(4) (West Supp. 1991)	Distribution of catalogs or written solicitations by mail, or solicitation by media or any communication system, if annual Minnesota sales total $100,000 or more than 100 in-state transactions annually	6-01-88
Mississippi	Miss. Code Ann. § 27-67-4 (Supp. 1989)	"purposefully or systematically exploiting" consumer market by direct mail, unsolicited catalog distribution, media, etc.	7-01-88
Missouri	Mo. Stat. Ann. § 144.605(2) (West Supp. 1991)	"purposefully or systematically exploiting" market by direct mail, catalogs, media, etc.; affiliate "in same or similar line of business in this state"; sellers with no agents or place of business in the state and whose Missouri sales are less than $500,000 (or nationwide sales less than $12.5 million) are exempt	10-1-90
Nebraska	Neb. Rev. Stat. § 77-2702(21) (1990)	"continuous, regular, seasonal or systematic" solicitation and benefits from banking, financing, debt collection, etc.; affiliate "in same or similar line of business in this state"	10-01-87
Nevada	Nev. Rev. Stat. Ann. § 372.728 (Michie Supp. 1989)	"substantial and recurring" solicitation by mail or FAX and benefits from banking, financing, debt collection, etc.; affiliate "in same or similar line of business" in the state	10-01-89
New Mexico	Reg. GR 3(E):4	"regularly exploits New Mexico markets" by newspaper, telephone, media or direct mail	7-01-91
New York	N.Y. Tax Law § 1101(b)(8) (McKinney Supp. 1991)	"regular or systematic" solicitation by mail or other means, if such solicitation "satisfies the nexus requirement" of the U.S. Const.	9-01-89
North Carolina	N.C. Gen. Stats. § 105-164.3; § 105-164.8 (1989)	retailer who makes a "mail order sale" is subject to tax if "purposefully or systematically" soliciting by mail, catalog, advertising, media, etc.	1-01-89
North Dakota	N.D. Cent. Code § 57-40.2-01 (Supp. 1989)	"regular or systematic" solicitation by mail, catalog, advertising, media, etc.	7-01-87

State	Statute(s)	Description of Liability	Effective Date
Ohio	Ohio Rev. Code Ann. § 5741.01(H) (Anderson Supp. 1990)	"conducts a continuing pattern of advertising" by mail or media broadcasts, if seller benefits from banking, financing, debt collection, etc. in state	10-05-87; current 7-18-90
Oklahoma	Okla. Stat. Ann. 68 §§ 1354.1, 1354.2 (West Supp. 1991)	"continuous, regular or systematic solicitation" by advertisement through mail order or catalog publications	7-01-86
Rhode Island	R.I. Gen. Laws § 44-18-23	solicitation of orders and advertising in R.I. by means of catalogs and other advertising, telephone solicitation, or radio and t.v. advertising	9-01-90
South Carolina	S.C. Code § 12-36-70; § 12-36-1340 (Law. Co-op. Supp. 1990)	any seller that does not maintain an office in the state, but who solicits sales by catalogs, shall collect the tax	6-22-87
	Act 612, Laws 1990, as amended by H.B. 3272, Laws 1991	"exploit[ing] the South Carolina market through mail order sales, television shopping networks and shows, telephone "900" services, and other marketing techniques"	
Tennessee	Tenn. Code Ann. § 67-6-102(6)(J) (1989)	"regular or systematic" solicitation by mail, catalog, media, etc.	1-01-89
Texas	Tex. Tax Code Ann. § 151.107 (Vernon Supp. 1991)	"substantial and recurring" solicitation by mail and benefits from banking, financing, debt collection, etc.	7-22-87
Utah	Utah Code § 59-12-102(9)(C) (Supp. 1990)	"regular or systematic" solicitation by catalogs, mail, advertising, media, etc.	7-01-90
Vermont	Vt. Stat. Ann. tit. 32 § 9701(9) (Supp. 1990)	"regular, systematic, or seasonal solicitation" by mail, catalogs, advertising, media, etc., if seller makes annual Vermont sales of at least $50,000.00; "Vendor" also includes a person who "owns or controls a person engaged in the same or similar line of business in the state"	6-22-89
Virginia	Va. Code Ann. § 58.1-612(C) (1991)	"continuous, regular, seasonal or systematic" solicitation by mail + benefits from banking, financing, debt collection, etc.; affiliate located in the Commonwealth	7-01-91
Washington	Wash. Admin. Code 458-20-221 (1989)	"purposefully or systematically" exploits marketplace through catalogs, direct mail, media, etc.; affiliate in "same or similar line of business" in state	4-01-89

State	Statute(s)	Description of Liability	Effective Date
West Virginia	W. Va. Code § 11-15A-6a (Supp. 1990)	"substantial and recurring" solicitation and benefits from banking, financing, debt collection, etc. *IF* seller has physical presence or "any other presence that provides the necessary minimum contacts for a constitutionally sufficient nexus"	7-01-89

APPENDIX D

STATE STATUTES OF LIMITATIONS FOR THE ASSESSMENT OF USE TAX WHEN NO RETURN IS FILED

State	Statute(s)	Limitations Period If No Return Filed
Alabama	Ala. Code § 40-23-76 (1985)	None
Arizona	Ariz. Rev. Stat. Ann. § 42-113B1(b) (1991)	None
Arkansas	Ark. Code § 26-18-306(f) (1987)	None
California	Cal. Rev. & Tax Code § 6487 (West 1987)	8 Years
Colorado	Colo. Rev Stat. § 39-26-210 (1990)	3 Years
Connecticut	Conn. Gen. Stat. Ann. § 12-415(7) (West Supp. 1991) Conn. Gen. Stat. Ann. § 12-416(1) (West Supp. 1991)	None
District of Columbia	D.C. Code Ann. § 47-2011 (1990)	3 Years
Florida	Fla. Stat. Ann. § 95.091(3)(a)1(d) (West Supp. 1991)	None
Georgia	Ga. Code Ann. § 48-2-49(c) (1991)	None
Idaho	Idaho Code § 63-3633(c) (1989)	7 Years
Illinois	Ill. Ann. Stat. ch. 120 ¶ 439.12 (Smith-Hurd 1991) Ill. Ann. Stat. ch. 120 ¶ 444 (Smith-Hurd 1991)	None
Indiana	Ind. Code Ann. § 6-8.1-5-2(d) (West Supp. 1991)	None
Iowa	Iowa Code Ann. § 422.54 (West 1990) Iowa Admin. Code r. 701-11.2	None
Kansas	Kan. Stat. Ann. § 79-3609 (1989)	3 Years
Kentucky	Ky. Rev. Stat. Ann. § 139.620 (Michie 1991)	None

State	Statute(s)	Limitations Period If No Return Filed
Louisiana	La. Rev. Stat. Ann. § 47:1580(A)(5) (West 1990)	None
Maine	Maine Rev. Stat. Ann. tit. 36 § 141(2)(C) (1990)	None
Maryland	Md. Tax-Gen. Code Ann. § 13-1102(b) (1988)	None
Massachusetts	Mass. Ann. Laws ch. 62C § 26(d) (West 1988)	None
Michigan	Mich. Comp. Laws Ann. § 205.27a(2) (West Supp. 1991)	None
Minnesota	Minn. Stat. Ann. § 289A.38, Subdiv. 5 (West 1991)	None
Mississippi	Miss. Code Ann. § 27-65-42 (1990)	None
Missouri	Mo. Ann. Stat. § 144.220(i) (Vernon Supp. 1991)	None
Nebraska	Neb. Rev. Stat. § 77-2709(5)(c) (1990)	5 Years
Nevada	Nev. Rev. Stat. Ann. § 372.430 (Michie 1986)	8 Years
New Jersey	N.J. Stat. Ann. § 54:32B-27 (West 1986)	None
New Mexico	N.M. Stat. Ann. § 7-1-18 (1988)	7 Years
New York	N.Y. Tax Law § 1147(b) (McKinney 1987)	None
North Carolina	N.C. Gen. Stat. § 105-241.1(e) (1990)	None
North Dakota	N.D. Cent. Code Ann. § 57-39.2-15 (1991)	6 Years
Ohio	Ohio Rev. Code Ann. § 5741.16B (Baldwin 1986)	None
Oklahoma	Okla. Stat. Ann. tit. 68 § 223(c) (West 1966)	None
Pennsylvania	72 Pa. Cons. Stat. Ann. § 7259 (Purdon 1990)	None

State	Statute(s)	Limitations Period If No Return Filed
Rhode Island	R.I. Gen. Laws § 44-19-13 (1988)	None
South Carolina	S.C. Code Ann. § 12-54-80(1) (Law. Co-op. Supp. 1990)	None
South Dakota	S.D. Codified Laws Ann. § 10-59-16 (1989)	None
Tennessee	Tenn. Code Ann. § 67-1-1501(b)(1) (1989)	None
Texas	Tex. Tax Code Ann. § 111.205(2) (Vernon 1982 & Supp. 1991)	None
Utah	Utah Code Ann. § 59-12-110(9) (1987)	None
Vermont	Vt. Stat. Ann. tit. 32 § 9815(b) (1981 & Supp. 1990)	None
Virginia	Va. Code Ann. § 58.1-634 (1991)	6 Years
Washington	Wash. Rev. Code § 82.32.100 (Supp. 1991)	None
West Virginia	W. Va. Code § 11-10-15 (1987)	None
Wisconsin	Wis. Stat. Ann. § 77.59(8) (West 1989)	None
Wyoming	Wy. Stat. § 39-6-510 (1991)	None

APPENDIX E

ESTIMATED POTENTIAL RETROACTIVE TAX LIABILITY (IN MILLIONS) FOR THE YEARS 1985 THROUGH 1991 IF *NATIONAL BELLAS HESS, INC. v. DEP'T OF REVENUE*, 386 U.S. 753 (1967) WERE OVERRULED

1985 - 1991

State [1]	1985 [2]	1986 [2]	1987	1988 [2]	1989	1990	1991	Total Estimated Potential Tax Liability [3]
Arizona (1989)	0	0	0	0	9.39	32.21	32.21	73.81
Arkansas (1961)	11.53	12.22	12.22	14.34	14.34	14.34	14.34	93.33

Source: Advisory Commission on Intergovernmental Relations, Staff Information Report, *Estimates of Revenue Potential from State Taxation of Out-of-State Mail Order Sales* (Sept. 1987).

(1) Date shown is the effective date of earliest catalog nexus provision.

(2) ACIR Estimated Annual Revenue Total [In Millions]. This figure was adjusted by 11% to account for revenue attributable to mail order sales made by sellers with a physical presence in the state (based on ACIR estimate for the United States as a whole).

(3) The 1988 adjusted ACIR figures were used for 1989, 1990 and 1991, since no ACIR state estimates were available for those years. The 1986 adjusted ACIR figure was used for 1987. Liability was assumed to be zero for years in which a particular state had no effective catalog nexus provision, or in which assessment is barred by the state's statute of limitations.

State	1985	1986	1987	1988	1989	1990	1991	Total Estimated Potential Tax Liability
California (1988)	0	0	0	331.99	331.99	331.99	331.99	1,327.96
Connecticut (1989)	0	0	0	0	27.08	54.165	54.165	135.41
Florida (1955)	80.52	86.61	86.61	101.58	101.58	101.58	101.58	660.06
Georgia (1951)	27.57	30.48	30.48	35.75	35.75	35.75	35.75	231.53
Idaho (1989)	0	0	0	0	4.19	8.39	8.39	20.97
Illinois (1961)	87.60	92.35	92.35	108.30	108.30	108.30	108.30	705.50
Iowa (1988)	0	0	0	9.84	19.67	19.67	19.67	68.85
Kansas (1965)	0	0	0	0	19.40	19.40	19.40	58.20
Kentucky (1988)	0	0	0	13.80	30.10	30.10	30.10	104.10
Michigan (1961)	51.25	53.67	53.67	62.95	62.95	62.95	62.95	410.39
Minnesota (1988)	0	0	0	24.71	42.37	42.37	42.37	151.82
Mississippi (1955)	16.55	17.73	17.73	20.79	20.79	20.79	20.79	135.17
Missouri (1959)	32.41	34.83	34.83	40.86	40.86	40.86	40.86	265.51
Nebraska (1987)	0	0	2.19	10.27	10.27	10.27	10.27	43.27
Nevada (1989)	0	0	0	0	2.85	11.39	11.39	25.63
New Jersey (1966)	74.14	81.29	81.29	95.35	95.35	95.35	95.35	618.12
New Mexico (1966)	6.96	9.15	9.15	10.72	10.72	10.72	10.72	68.14
New York (1965)	122.54	135.29	135.29	158.69	158.69	158.69	158.69	1,027.79
North Carolina (1989)	0	0	0	0	42.09	42.09	42.09	126.27
North Dakota (1987)	0	0	2.70	5.40	5.40	5.40	5.40	24.30
Ohio (1962)	73.64	76.71	76.71	89.98	89.98	89.98	89.98	586.98
Oklahoma (1986)	0	8.19	16.39	19.22	19.22	19.22	19.22	101.46
Pennsylvania (1959)	92.14	96.96	96.96	113.73	113.73	113.73	113.73	740.98
Rhode Island (1958)	7.87	8.37	8.37	9.82	9.82	9.82	9.82	63.89
South Carolina (1951)	21.01	22.47	22.47	26.36	26.36	26.36	26.36	171.39

State	1985	1986	1987	1988	1989	1990	1991	Total Estimated Potential Tax Liability
Tennessee (1955)	34.05	37.23	37.23	43.67	43.67	43.67	43.67	283.19
Texas (1987)	0	0	57.22	161.08	161.08	161.08	161.08	701.54
Utah (1990)	0	0	0	0	0	7.22	14.44	21.66
Vermont (1969)	2.90	3.18	3.18	3.74	3.74	3.74	3.74	24.22
Virginia (1966)	34.96	42.53	42.53	49.89	49.89	49.89	49.89	319.58
Washington (1989)	0	0	0	0	45.78	61.04	61.04	167.86
West Virginia (1989)	0	0	0	0	7.21	14.42	14.42	36.05
							Total:	$9,594,930,000

APPENDIX F

ESTIMATED POTENTIAL RETROACTIVE TAX LIABILITY (IN MILLIONS) FOR THE YEARS 1986 THROUGH 1991 IF *NATIONAL BELLAS HESS, INC. v. DEP'T OF REVENUE*, 386 U.S. 753 (1967) WERE OVERRULED (BASED ON NEWLY ENACTED STATUTES ONLY)

State	Eff. Date	1986	1987 [1]	1988 [1]	1989	1990	1991	Total Estimated Potential Tax Liability [2]
Alabama	04/30/86	14.97	22.48	26.36	26.36	26.36	26.36	142.89
Arizona	09/15/89	0	0	0	9.39	32.21	32.21	73.81
Arkansas	07/01/87	0	7.17	14.34	14.34	14.34	14.34	64.53
California	01/01/88	0	0	331.99	331.99	331.99	331.99	1,327.96

Source: Advisory Commission on Intergovernmental Relations, Staff Information Report, *Estimates of Revenue Potential from State Taxation of Out-of-State Mail Order Sales* (Sept. 1987).

(1) ACIR Estimated Annual Revenue Total [in Millions]. This figure was adjusted by 11% to account for revenue attributable to mail order sales made by sellers with a physical presence in the state (based on ACIR estimate for the United States as a whole).

(2) To 12-31-91, using 1986 and 1988 unadjusted ACIR figures for estimated revenue potential, adjusted to account for mail order sales made by companies with an in-state physical presence. The 1988 adjusted ACIR figures were also used for computation in 1989, 1990 and 1991, since no ACIR estimate was available for those years. The 1986 adjusted figure was used for 1987 computations.

State	Eff. Date	1986	1987	1988	1989	1990	1991	Total Estimated Potential Tax Liability
Connecticut	07/01/89	0	0	0	27.08	54.165	54.165	135.41
Florida	10/01/87	0	21.65	101.58	101.58	101.58	101.58	427.97
Georgia	07/01/90	0	0	0	0	17.88	35.75	53.63
Idaho	07/01/89	0	0	0	4.19	8.39	8.39	20.97
Illinois	01/01/90	0	0	0	0	108.30	108.30	216.60
Iowa	07/01/88	0	0	9.84	19.67	19.67	19.67	68.85
Kansas	07/01/90	0	0	0	0	9.70	19.40	29.10
Kentucky	07/15/88	0	0	13.80	30.10	30.10	30.10	104.10
Minnesota	06/01/88	0	0	24.71	42.37	42.37	42.37	151.82
Mississippi	07/01/88	0	0	10.39	20.79	20.79	20.79	72.76
Missouri	10/01/90	0	0	0	0	10.22	40.86	51.08
Nebraska	10/01/87	0	2.19	10.27	10.27	10.27	10.27	43.27
Nevada	10/01/89	0	0	0	2.85	11.39	11.39	25.63
New Meixco	07/01/91	0	0	0	0	0	5.36	5.36
New York	09/01/89	0	0	0	52.89	158.69	158.69	370.27
North Carolina	01/01/89	0	0	0	42.09	42.09	42.09	126.27
North Dakota	07/01/87	0	2.70	5.40	5.40	5.40	5.40	24.30
Ohio	10/05/87	0	19.18	89.98	89.98	89.98	89.98	379.10
Oklahoma	07/01/86	8.19	16.39	19.22	19.22	19.22	19.22	101.46
Rhode Island	09/01/90	0	0	0	0	3.27	9.82	13.09
South Carolina	06/22/87	0	11.24	26.36	26.36	26.36	26.36	116.68
Tennessee	01/01/89	0	0	0	43.67	43.67	43.67	131.01
Texas	07/22/87	0	57.22	161.08	161.08	161.08	161.08	701.54
Utah	07/01/90	0	0	0	0	7.22	14.44	21.66
Vermont	06/22/89	0	0	0	1.87	3.74	3.74	9.35
Virginia	07/01/91	0	0	0	0	0	24.95	24.95
Washington	04/01/89	0	0	0	45.78	61.04	61.04	167.86
West Virginia	07/01/89	0	0	0	7.21	14.42	14.42	36.05
							Total:	$5,239,330,000.00

APPENDIX G

Commerce Clause Decisions Overruled by the United States Supreme Court

Overruling Decision	Overruled Decision(s)	Resolution of Retroactivity Problems
Wabash, S.L. & P.R. Co. v. Illinois, 118 U.S. 557 (1886)	*Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877)	No retroactive liability demonstrated—new state statute immediately challenged and invalidated.
Philadelphia & Southern Mail S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887)	*State Tax on Railway Gross Receipts*, 82 U.S. (15 Wall.) 284 (1873)	No retroactive liability demonstrated—state attempted to enforce tax liabilities based on *State Tax on Railway Gross Receipts.*
Leloup v. Port of Mobile, 127 U.S. 640 (1888)	*Osborne v. Mobile*, 83 U.S. (16 Wall.) 479 (1873)	No retroactive liability demonstrated—state attempted to enforce statute based on *Osborne.*
Leisy v. Hardin, 135 U.S. 100 (1890)	*Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847)	No retroactive liability at stake—new state statute challenged and invalidated.
Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925)	*Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)	No retroactive liability at stake—new state statute immediately challenged and invalidated.

Overruling Decision	Overruled Decision(s)	Resolution of Retroactivity Problems
East Ohio Gas Co. v. Tax Commissioner, 283 U.S. 465 (1931)	*Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920)	Parties did not raise retroactivity issue, and no significant reliance interests were at stake, since taxpayer had not relied on invalidated precedent. *See* Brief of Appellees at 9, *East Ohio Gas Co. v. Tax Commissioner* (O.T. 1930, No. 453).
United States v. Darby, 312 U.S. 100 (1941)	*Hammer v. Dagenhart*, 247 U.S. 251 (1918)	Indictment apparently sought to penalize only behavior that occurred after the Fair Labor Standards Act of 1938 (52 Stat. 1060) was passed (*Darby*, 312 U.S. at 109), and Court found that any reliance on *Hammer* was completely unfounded. *Id.* at 116-17.
California v. Thompson, 313 U.S. 109 (1941)	*DiSanto v. Pennsylvania*, 273 U.S. 34 (1927)	Court found *DiSanto* was "departure" from its jurisprudence (*Thompson*, 313 U.S. at 116), thus statute upon which misdemeanor convictions was based was in harmony with existing law.
Edwards v. California, 314 U.S. 160 (1941)	*New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837)	State law invalidated in this case (allowing state to exclude paupers) had not been enforced by the State except in the year prior to its invalidation (*see* Brief of the Attorney General of the State of California on Behalf of the Appellee at 4, 24, *Edwards v. California* (O.T. 1941, No. 17)). Also, no discussion of retroactive impact before the Court.
United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944)	*Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *Hooper v. California*, 155 U.S. 648 (1895)	Significant retroactive liability at stake; Supreme Court reserved question of "[w]hether reliance on earlier statements of this Court in the *Paul v. Virginia* line of cases that insurance is not 'commerce' could ever be pleaded as a defense to a criminal prosecution under the Sherman Act . . . ." *Underwriters Ass'n*, 322 U.S. at 562 n.50.
Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949)	*St. Louis v. Ferry Company*, 78 U.S. (11 Wall.) 423 (1871); *Old Dominion Steamship Co. v. Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Tie Co. v. Kentucky*, 202 U.S. 409 (1906)	No significant retroactive liability implicated, and retroactivity argument not briefed before the Supreme Court.

Overruling Decision	Overruled Decision(s)	Resolution of Retroactivity Problems
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	*Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)	Although appellant argued that it would face retroactive liability (Brief of Appellant at 33-36, *Complete Auto* (No. 76-29)), the Court noted that, by the time *Complete Auto* arose, "'only the most sanguine taxpayer would conclude that the Court maintains a serious belief in the doctrine that the privilege of doing interstate business is immune from state taxation'" (*Complete Auto*, 430 U.S. at 287) (quoting Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term:* Standard Pressed Steel *and* Colonial Pipeline, 62 Va. L. Rev. 149, 188 (1976)); thus, any reliance on *Spector Motor* was unjustifiable.
Washington Revenue Department v. Stevedoring Ass'n, 435 U.S. 734 (1978)	*Puget Sound Stevedoring Co. v. Tax Com.*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947)	No retroactivity at stake: new statute was immediately challenged in declaratory judgment action.
Hughes v. Oklahoma, 441 U.S. 322 (1979)	*Geer v. Connecticut*, 161 U.S. 519 (1896)	No retroactivity implicated—state was trying to prosecute under statute invalidated in the case.
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)	*Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922)	The Court had "long since rejected" *Heisler's* "mechanisal" intrastate/interstate distinction (*Commonwealth Edison*, 453 U.S. at 614-15); thus, any reliance on *Heisler* was unjustified. Also, retroactivity issue was not briefed, and was irrelevant given outcome of case (*i.e.*, statute upheld despite overruling of precedent utilized by State).
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982)	*Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908)	No retroactive liability at stake: State had brought action to enjoin appellants from transferring water across the border without a permit, in reliance on *Hudson County Water Co.*; thus, overruling that precedent did not impose any retroactive liability on the State.
Arkansas Elec. Cooperative Co. v. Arkansas Public Service Commission, 461 U.S. 375 (1983)	*Public Utilities Commission of R.I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927)	No retroactive liability at stake as a result of reliance on prior precedent, since the Court noted that it could "find no strong reliance interests that would be threatened" by overruling *Attleboro*. *Arkansas Elec. Coop.*, 461 U.S. at 392.

Overruling Decision	Overruled Decision(s)	Resolution of Retroactivity Problems
Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987)	*General Motors Corp. v. Washington*, 377 U.S. 436 (1964)	Potentially significant retroactive liability at stake. Court remanded issue of retroactivity to state court. *Tyler Pipe*, 483 U.S. at 251-53.
American Trucking Associations v. Scheiner, 483 U.S. 266 (1987)	*Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Corp. v. Bd. of R.R. Comm'rs*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935)	Significant retroactive liability at stake. Court remanded retroactivity issue to state court. *Scheiner*, 483 U.S. at 297-98. Retroactive liability later limited. *See American Trucking Associations v. Smith*, 110 S.Ct. 2323 (1990).
Healy v. Beer Institute, Inc., 491 U.S. 324 (1989)	*Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)	No significant retroactive liability at stake—new state statute immediately challenged and invalidated.

[Source: Congressional Research Service: The Constitution of the United States of America: Analysis and Interpretation 2115-27 (1987 & Supp. 1990)]